(3)

No. 91-72

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FEDERAL TRADE COMMISSION,
Petitioner,

v.

TICOR TITLE INSURANCE CO., et al.,
Respondent.

BRIEF OF AMICUS CURIAE STATES OF WISCONSIN, ALABAMA, ALASKA, ARIZONA, ARKANSAS, IDAHO, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES AND RULES CITED

Page

OTHER AUTHORITIES

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The States of Wisconsin, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia (hereinafter "Amici States") submit this brief in support of the Federal Trade Commission's petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in *Ticor Title Insur. Co. v. F.T.C.* (hereinafter *Ticor*), 922 F.2d 1122 (3rd Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991). Review is warranted because the decision of the Third Circuit panel adopts a standard for the active supervision prong of the state action doctrine which

undermines state antitrust enforcement and which "conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c).

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1]

The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] As the principal public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

Respondent insurers conceded that the price-fixing agreements at issue here actually occurred and that they were unfair and anti-competitive within the meaning of section 5 of the FTC Act. *Ticor*, 922 F.2d at 1124. Immunizing such price-

[1] *E.g.*, *Carl N. Swenson Co., Inc. v. E.C. Braun Co.*, 272 Cal. App.2d 366, 77 Cal. Rep. 378, 379-80 (1969); *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 219 A.2d 635 (1966); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). *See also* Mont. Code Ann. § 30-14-104 (1989); Utah Code Ann. § 76-10-926 (1991).

[2] 15 U.S.C. § 15(c) (1989); *State of Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972).

fixing agreements strikes at the heart of state antitrust enforcement.

The state regulatory regimes at issue here explicitly direct that the insurance commissioners rely on the competitive marketplace rather than regulate rates directly.[3] Unwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct under federal antitrust law, state insurance law or other state regulatory schemes. The attorneys general have a vital interest in maintaining the integrity of the process by which insurance transactions are accomplished. The novel exemption fashioned by the court of appeals invites price fixing by insurers in all lines of insurance despite clear state statutory language indicating a reliance on competition in such markets.

Moreover, the attorneys general are continually forced to weigh the need for antitrust enforcement in industries which often may be subject to some degree of state oversight. Expanding antitrust immunity would, thus, seriously impair antitrust enforcement in general.

The Amici States support the Federal Trade Commission's contention that the state action doctrine does not immunize the price-fixing agreements at issue here.

SUMMARY OF ARGUMENT

The attorneys general ask the Court to grant the petition for certiorari for the following reasons:

1. In *Patrick v. Burget*, 486 U.S. 94 (1988), this Court explicitly conditioned the active supervision prong of the state action test upon a showing that the States "*have and exercise* power to review particular anti-competitive acts of private

[3] *See, e.g.*, Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1989).

parties and disapprove those that fail to accord with state policy." *Id.* at 101 (emphasis added). The state's involvement must be sufficient to convert private anticompetitive action into that of the state itself. *Id. Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum.*, 445 U.S. 97, 106 (1980). The court of appeals departed from both this Court's standard and rationale, instead adopting a rule that "some basic level of [regulatory] activity" would be sufficient to meet the active supervision prong of the state action defense (Pet. App. at 28a).[4]

2. The court of appeal's decision is erroneous because the relevant state statutes expressly rely on competition to determine title insurance rates and search and examination fees. The filings of rating bureaus provide *notice* to regulators of rates that may be charged but do not establish joint rates. Indeed, agreements to charge specific fees are explicitly prohibited by state law. Far from being reviewed by state regulators, the agreements by title insurers to fix search and examination fees and to file rates jointly based in part on those fees, subverted the state regulatory scheme by making rate review impossible.

In acquiescing to the filings, the states did not authorize the price fixing which preceded the filing. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 554 n.26 (1978). State approval of one activity (*i.e.*, the filing of pooled rating information) is not state approval of a related but distinct activity (*i.e.*, classic horizontal price-fixing).

3. The court of appeals based its decision upon a stylized and selective choice of facts regarding state supervision in Wisconsin and Montana. However, even the facts relied upon by the court of appeals would not support a holding that the "active supervision" prong of this Court's state action test had been met under *Patrick* and *Midcal*.

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[4] "Pet. App." refers to Appendix A attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit submitted by petitioner Federal Trade Commission.

4. The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active state supervision. *Ticor*, 922 F.2d at 1139-40. The extraordinary writ of mandamus cannot substitute for active state supervision. In Wisconsin and Montana, mandamus cannot remedy the price-fixing conduct or compel state officials to exercise their discretion. In any event, mandamus does not constitute active state supervision. Putting the burden on *consumers* rather than state officials to initiate review of the anticompetitive conduct directly contravenes the standard and rationale for state action immunity.

ARGUMENT

I. THE TEST APPLIED BY THE COURT OF APPEALS CONFLICTS WITH LONG-STANDING PRECEDENT OF THIS COURT.

Virtually every industry is subject to state oversight at some basic level, by at least one state agency. The scope of state oversight extends from licensing and regulation of the professions and quasi-professions, *see generally*, Mont. Code Ann. Title 37, *et seq.* (1989); Wis. Stat. ch. 440, *et seq.* (1989-90), and environmental regulation; Mont. Code Ann. Title 75 (1989); Wis. Stat. ch. 144 (1989-90), to worker safety regulation; Wis. Stat. ch. 50 (1989-90), Mont. Code Ann. §§ 70-73, 76-78 (1989); Wis. Stat. ch. 101 (1989-90), and intensive regulation of utilities; Mont. Code Ann. Title 69 (1989); Wis. Stat. ch. 196 (1989-90).

This Court has repeatedly stated that before private parties regulated by the states can enjoy immunity from federal antitrust liability, such parties must satisfy a two-pronged test determined by this Court. *Patrick v. Burget*, 486 U.S. 94, 100 (1988). First, the conduct must be undertaken pursuant to a

"clearly articulated and affirmatively expressed" state policy to displace competition with regulation. Second, the anti-competitive conduct must be "actively supervised by the state." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum.*, 445 U.S. 97, 105 (1980).

This Court explicitly conditioned the active supervision prong upon a showing that the states "*have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 101 (emphasis added).[5] The rationale for this standard is that "[w]here a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). The state's involvement must be sufficient to convert private anticompetitive action into that of the state itself. *Patrick*, 486 U.S. at 105; *Midcal*, 445 U.S. at 106.

The court of appeals ignored this controlling precedent and substituted the following standard:

> Where . . . the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

Ticor at Pet. App. 28a (quoting *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) ("NEMRB")).

In sharp contrast to this Court's decision, *Midcal* and *Patrick*, which conditioned state action immunity for private parties on a review of "the particular anticompetitive acts of private parties," the court of appeals adopted what amounts to little more than a "bodies, buildings and budget" standard. Even where the state has not reviewed the anticompetitive conduct, and even where the state statutes themselves rely on competition, rather than regulation, to set rates, the mere presence of a state regulatory regime could provide antitrust immunity for unreviewed activities that would otherwise be *per se* unlawful under the antitrust laws.

Indeed, the lower court's standard, may, if not reversed by this Court, enable private parties in many industries subjected to "some basic level of [regulatory] activity" to claim state action immunity from federal antitrust liability. Thus, the decision below, if unreviewed, may have an impact on virtually all private conduct that is remotely affected by state regulation. For this reason alone, the Court should grant the Commission's petition for certiorari and reverse and remand this case with directions that the court of appeals apply the active supervision prong enunciated by this Court in *Patrick*, *Midcal* and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

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[5] The Federal Trade Commission rejected, on the basis of extensive findings of fact, the state action defense of the title insurers as to six states. Pet. App. at 42a. The court of appeals reversed and vacated the decision of the Federal Trade Commission. This brief focuses on Wisconsin and Montana because the FTC's petition for *certiorari* treats them as leading examples of the erroneous analysis of the state action defense by the court of appeals. The case, however, has implications for state regulation and antitrust enforcement far beyond these two states.

II. THE CIRCUIT COURT'S DECISION IS ERRONEOUS BECAUSE MONTANA'S AND WISCONSIN'S INSURANCE REGULATORY SCHEMES RELY ON COMPETITION TO SET RATES AND, HENCE, DO NOT PROVIDE FOR ACTIVE STATE REVIEW.

The court of appeals misapprehended the purpose of the joint filing by rating bureaus when it stated: "Once the title insurance rating bureau establishes the uniform rate for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services." *Ticor* at Pet. App. 12a. However, nothing in the Montana and Wisconsin statutes suggest that the information filings of the rating bureau "establishes" rates. To the contrary, as indicated below, the statutes prohibit agreements among insurers to charge any rates or fees.

A. Title insurers in Montana and Wisconsin are expected to set title insurance rates competitively and to submit filings for the limited purpose of giving insurance commissioners "notice" of rates being charged.

Insurers are required to give "notice" to the insurance commissioner of the rates they charge. Mont. Code Ann. § 33-16-203(1) (1989); Wis. Stat. § 625.15 (1989-90). An insurer may discharge this obligation by developing its own cost data or by relying upon a filing by a licensed rate service organization ("rating bureau"), with "such modification for its own expense and loss experience as the credibility of that experience allows." Mont. Code Ann. § 33-16-203(1) (1989); Wis. Stat. § 625.15(1) (1989-90). Rating bureaus are permitted to exist so as to make more efficient the collection and pooling of claims and expense data against which individual insurers can price their product

on a competitive basis. Mont. Code Ann. § 33-16-202(2)(3) (1989); Wis. Stat. § 625.01 (1989-90).[6]

Nothing in the insurance statutes of Wisconsin and Montana compels or authorizes price fixing by title insurers of search and examination fees.[7] To the contrary, these states rely upon competition to set title insurance rates and, consistent with that reliance, do not provide for active review of the filed "notices" of rates. Far from condoning price fixing, the insurance statutes of Wisconsin and Montana *explicitly prohibit* agreements among insurers to use or adhere to rates. *E.g.*, Wis. Stat. § 625.33 (1989-90); Mont. Code Ann. § 33-16-303 (1989).[8] Moreover, insurers are expected to decide, unilaterally, what rates they will charge based upon "average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows." *E.g.*, Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1989). The reliance

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[6] For example, the purposes of the rating bureau statute include:

> (a) To protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates;
>
> (b) To encourage, as the most effective way to produce rates that conform to the standards of par. (a), independent action by and reasonable price competition among insurers.

Wis. Stat. § 625.01(a) and (b) (1989-90).

[7] The clear articulation prong of the *Midcal* analysis is not at issue in this case. However, an understanding of state regulatory policies is relevant to active supervision.

[8] The 1969 Committee Comment dealt with this issue explaining: "*Rates may be made* individually or collectively *by bureaus*, but *agreements to adhere to bureau rates are prohibited*. Wis. Stat. Ann. ch. 625 (1960) (Committee Comment at 5) (emphasis added).

on competition to set rates and related expenses is underscored by the Committee Comment to the 1969 revisions to the Wisconsin insurance statutes: "Of course, a competitively oriented rating law such as this one will not provide for active regulatory intervention to ensure what this section directs, but it sets the standard and relies mainly on competition to achieve the goal." Wis. Stat. Ann. § 625.15 (1969) (Committee Comment). *See also*, Mont. Code Ann. § 33-16-101(2) (1989).[9]

Although the Wisconsin Legislature recognized that there might be situations in which "price competition is replaced by price fixing in concert," Wis. Stat. Ann. § 625.15 (1969) (Committee Comment), the Legislature's move to the new system was premised on the assumption that insurance markets operate competitively. Consistent with this premise, the statutes provide that: "Insurers can use the rates they choose. No approval is required, and a filing is required only for information and after the fact." *Id.*

Given the laissez faire structure of insurance rate regulation described above, it is understandable why, for example, Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees: they relied on competition to determine

[9] Indeed, the underlying premise of the 1969 revisions in Wisconsin's rating bureau statute underscores the emphasis the state placed on insurer competition to set rates, not direct regulation: "The existing [much more rigid and comprehensive] system of rate regulation has been rendered unnecessary through the development of a strikingly greater degree of meaningful price competition in many of the most important lines of insurance." Wis. Stat. Ann. ch. 625 (1969) (Committee Comment). The Wisconsin legislators concluded that this change in industry attitudes and practices together with enumerated defects in "[r]ate regulation in the traditional manner," "call for a system of rate control which eliminates the requirement that rates be reviewed by the commissioner before use." *Id.*

rates because their state insurance statutes expressly state that competition shall determine rates.[10]

B. The price-fixing would have made rate review impossible.

Even if the state regulatory structures had not relied on competition to set rates, and even if the state regulators had actively reviewed the rates, such review would have been ineffective because the figures reported for search and examination fees on the filings reflected *price-fixed* search and examination fees, not a compilation or average of fees each

[10] The record of this case could not be clearer that such rates were not reviewed. For example, the FTC noted that Wisconsin had never examined the title insurance rating bureau, never had a hearing on any insurance rate filing in any line of insurance, never issued a rate suspension order, did not have the resources to review rates and, in general, "Wisconsin followed a hands-off policy in dealing with title insurers." *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446 (F.T.C. 1989) (quoting testimony of Wisconsin regulators).

The FTC reported that a key Wisconsin official had testified that:

> Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?
>
> A. No.
>
> Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?
>
> A Yes.

Ticor Title Insur. Co., 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446 (F.T.C. 1989).

company expected to incur. Such price fixing undermined the ability of state regulators to review the reasonableness of the related rates on a state specific basis by distorting the market price for the fixed search and examination services.

The statements that insurers in Wisconsin and Montana are required to file with their respective insurance commissioners, *see* Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1989), must include information regarding risks, expenses and profits. *See* Wis. Stat. § 625.12 (1989-90); Mont. Code Ann. § 33-16-201 (1989). State law presumes that insurers incur costs and expenses in a competitive marketplace. *See, e.g.*, Wis. Stat. § 625.11 (1989-90); Mont. Code Ann. § 33-16-201 (1989).

Any attempt to determine whether or not rates or fees are excessive must include a comparison of the filed rates with rates and fees charged by insurers in the competitive market. If fees have been artificially inflated, excessive profits can be made to appear "acceptable." Distorting the market for costs thereby impairs any attempt to review the performance of insurers. Indeed, the passive, non-reactive regulatory structure and performance in these two states, as outlined by both the court of appeals and the FTC, *Ticor Title Insur. Co. v. F.T.C.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446, 22,450-51 (F.T.C. 1989), is logical given the reliance of the states generally on competitive markets for determining the level of title insurance rates.

As in *St. Paul*,[11] there is no indication here that in acquiescing to the "notice" filings, Wisconsin and Montana authorized the fixing of search and examination fees. *Id.* at 554 n.26. State acquiescence in one activity (*i.e.*, the filing of pooled rating information) is not state review, much less approval, of the separate and distinct activity (*i.e.*, classic horizontal price fixing of underlying expenses in that filing). *See generally In re Insur. Antitrust Litig.*, 7 Trade Reg. Rep. (1991-1 Trade Cas.) (CCH) ¶ 69,460 (9th Cir. June 18, 1991); *Bolt v. Halifax Hospital Medical Center, 891 F.2d 810* (11th Cir. 1990); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988).

The respondent insurers have failed to provide any evidence that the relevant states supervised or approved the agreement to fix title search and examination fees. Further, that agreement was neither a reasonable nor a necessary consequence of filing collective rate schedules and, in fact, would have subverted effective rate review had it been attempted. Private parties who subvert the regulatory process ought not to enjoy immunity emanating from that process. Accordingly, the respondent insurers' agreement to fix search and examination fees is neither state action nor immune from federal antitrust regulation.

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[11] In *St. Paul*, 438 U.S. 531, 554 n.26 (1978), the Court assumed that policy form changes desired by insurers had been filed with the state insurance director. However, even though Rhode Island acquiesced to the filing of these policy forms, there was no indication that Rhode Island had "authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *Id.* Hence, even though the state had received and approved the policy forms at issue in *St. Paul*, state action immunity was not available to the defendant insurers there.

III. EVEN THE FACTS FOUND BY THE COURT OF APPEALS FAIL TO SATISFY THE ACTIVE SUPERVISION PRONG.

In order to apply this Court's standard for active supervision, the Court need not embark upon an extensive review of the states' regulation of title insurance. Even the facts presented by the court of appeals provide no basis for a holding that either Wisconsin or Montana has exercised the power to review the private price fixing of respondent title insurers. *Patrick*, 486 U.S. at 101.

First, the court of appeals noted that both Montana and Wisconsin allowed unreviewed, collectively-formulated rates to be used prior to filing. *Ticor*, 922 F.2d at 1139-40. Moreover, the insurance regulators in Montana and Wisconsin are not required to hold a hearing or to examine the filings. *See, e.g.*, Wis. Stat. §§ 601.41(5) and 601.43(1) (1989-90); *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 786 P.2d 1199 (1990). Finally, the regulators in Montana and Wisconsin, according to the court of appeals, did no more than (1) receive submissions for filing; (2) check some of them for mathematical accuracy; and (3) make certain inquiries regarding geographic scope and supporting data. Many inquiries went unanswered at all, or unanswered for several years. *Ticor*, 922 F.2d at 1139-40 n.16.

Nothing in the decision of the court of appeals or in the record before the FTC suggests that either state reviewed the collectively set and enforced title search and examination fees to determine if they were "excessive, inadequate or unfairly discriminatory." *See, e.g.*, Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(a) (1989). Indeed, such a review would likely be unavailing where the insurance regulators would have no reason to believe that the search and examination prices they were reviewing had been price fixed. Such acquiescence is understandable because states such as Wisconsin and Montana rely primarily on *competition*, not

regulation, to determine the appropriate level of rates charged by insurers participating in rating bureaus.[12]

IV. THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT SUBSTITUTE FOR EFFECTIVE STATE SUPERVISION.

The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active *state* supervision. *Ticor*, 922 F.2d at 1139-40. The court of appeals' reliance on mandamus both misapprehends state law and contradicts the sound prior policy of this Court.

A. Placing the burden of enforcing state policy on consumers circumvents the policy underlying the state action doctrine.

The availability of mandamus does not constitute active state supervision. Active state supervision ensures that the state action doctrine shelters only the particular anti-competitive acts of private parties that actually further state regulatory policies. *Town of Hallie*, 471 U.S. at 46-47 (1985). The court of appeals' decision to substitute mandamus for "active

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[12] "On the whole, the insurance market is fairly competitive, and attention directed to making it more so will be more rewarding than effort directed to the regulation of particular rates." Wis. Stat. Ann. § 625.01 (1969) (Committee Comment). "It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise." Mont. Code Ann. § 33-16-101 (1989).

state supervision" takes the burden of initiating review from the state. As there is no guarantee that consumers or others will act to protect the policies and interests of the state, reliance on mandamus vitiates the policies underlying the state action doctrine.

Additionally, federal and state antitrust laws provide for treble damages to parties injured by antitrust violations. *See* 15 U.S.C. § 15 (1989); Wis. Stat. § 133.18 (1989-90); Mont. Code Ann. § 30-14-133 (1989). Treble damages provide private litigants with an incentive to supplement governmental enforcement of the antitrust laws. *See Gerol v. Arena*, 127 Wis. 2d 1, 377 N.W.2d 618 (Ct. App. 1985). Relief through mandamus provides no such incentive. *See, e.g., Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 100 (1981); *State ex rel. Butte Youth Serv. Center v. Murray*, 170 Mont. 171, 173-74, 551 P.2d 1017, 1019 (1976). By placing the duty to enforce state policy in the hands of consumers while removing the incentives provided by antitrust statutes, the court of appeals nullifies the policies and protections underlying the "active state supervision" requirement. To jeopardize the national policy in favor of competition in the face of such a gauzy cloak of state involvement runs counter to sound policy. *324 Liquor Corp.*, 479 U.S. at 343 (1987); *Midcal*, 445 U.S. at 105.

B. Mandamus is inappropriate to compel the insurance commissioner to regulate insurance rates as any arguable authority to investigate lies within the discretion of the Commissioner.

The remedy of mandamus is drastic, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967). It is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion. *See, e.g., Law Enforcement*

Standards Bd., 101 Wis. 2d at 494, 305 N.W.2d at 100; *Butte Youth Serv.*, 170 Mont. at 173-74, 551 P.2d at 1019 (mandamus is inappropriate to compel the performance of a discretionary function).

In Montana, the insurance commissioner has the discretion to investigate insurance rates and determine whether further action is warranted. *Gerber*, 242 Mont. at 372, 786 P.2d at 1201. Following an extensive review of the Montana code,[13] that the *Gerber* court determined that the insurance commissioner's investigative and prosecutorial discretion rivaled that of a prosecutor and warranted quasi-judicial immunity. *Id.* Accordingly, a writ of mandamus would not issue to compel the performance of a discretionary act.

Wisconsin has similarly placed certain powers within the discretion of the insurance commissioner.[14] Where authority is

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[13] *E.g.*, Mont. Code Ann. § 33-1-311(1) (1989): "[T]he commissioner MAY conduct such examinations and investigations . . . as [she] may deem proper"; Mont. Code Ann. § 33-1-701(1) (1989): "[T]he commissioner MAY hold hearings for any purpose within the scope of this code deemed by [her] to be necessary"; Mont. Code Ann. § 33-1-317 (1989): "[T]he commissioner MAY after having conducted a hearing pursuant to § 33-1-701, impose a fine"; Mont. Code Ann. § 33-1-318 (1989): "[W]henever IT APPEARS TO THE COMMISSIONER that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, she] MAY . . . issue an order directing the person to cease and desist." Mont. Code Ann. (1989) as cited in *Gerber*, 242 Mont. at 369, 786 P.2d at 1199 (all emphasis from opinion).

[14] *See, e.g.*, Wis. Stat. § 601.41(5) (1989-90): "The commissioner MAY at any time hold . . . hearings . . . for the purposes of investigation . . . ." Wis. Stat. § 601.43 (1989-90): "WHENEVER THE COMMISSIONER DEEMS IT NECESSARY in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner MAY examine the affairs and condition of . . . any person or organization of persons doing. . . insurance business in this state . . . ." Wis. Stat. § 625.21 (1989-90): "IF THE

(continued...)

combined with specific grants of discretion, a regulator's discretion to investigate is very broad. *See, e.g., Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988) (municipal officers have no legal obligation to prosecute all cases in which an individual commits a violation of municipal ordinances . . . even when open and flagrant). *See also Gerber*, 242 Mont. at 372, 786 P.2d at 1201. ("Like the prosecutor, the [insurance] commissioner has the discretion to investigate and determine whether further action is warranted.")

Accordingly, mandamus is unavailable to aggrieved persons because the insurance commissioner's duty to investigate and prosecute is wholly discretionary. *Vretenar*. Mandamus is also improper because "it would be unavailing, nugatory, or useless [and] its issuance would constitute an idle act." *Heider v. City of Wauwatosa*, 37 Wis. 2d 466, 482, 155 N.W.2d 17, 25-26 (1967).

Failing to recognize the discretionary nature of the insurance commissioner's power, and the impropriety of a writ of mandamus to compel these discretionary duties, the court of appeals erroneously concluded that mandamus was a proper mechanism to force "active state supervision." *Ticor*, 922 F.2d at 1139-40. As mandamus is highly inappropriate, the Third Circuit Court of Appeals' decision to grant state action immunity to the respondent title insurers must be reversed.

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[14](...continued)
COMMISSIONER FINDS that competition is not an effective regulator of rates . . . he or she MAY promulgate a rule." (Emphasis added.)

CONCLUSION

For the foregoing reasons, this Court should grant the petition of the Federal Trade Commission for a Writ of Certiorari.

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